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In the Supreme Court of the United States

OCTOBER TERM, 1959.

DEAN ELIJAH ELKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 632

DEAN EJNARD BJORSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 60-70) is reported at 272 F. 2d 244.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1959 (R. 71). On December 5, 1959, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 9, 1960. The petition was filed on January 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, classified as a conscientious objector under the Selective Service System, failed to exhaust the administrative procedures by which a classification may be challenged.

2. Whether, in any event, petitioner was entitled to claim a IV-F classification on the basis of a prior felony conviction, where the local board had obtained waiver of objection by the armed forces before reclassifying petitioner from IV-F to I-A.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Universal Military Training and Service Act, and of the Selective Service Regulations and Army Special Regulations are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

Petitioner seeks review of a judgment holding him guilty of refusal to comply with an order of the Selective Service Board, in violation of the Universal Military Training and Service Act, Sec. 12(a) (50 U.S.C. App. 462(a)) (R. 9-11). Sentence of one year imprisonment was imposed (R. 10).

Petitioner was classified IV-F on April 13, 1954, by reason of an earlier conviction for violation of the Act (R. 22). Upon release from prison in 1956, he obtained private employment at $80 per week (R. 23). On July 12, 1956, the Joint Induction Screening Group for the Armed Forces approved the Armed Forces Moral Waiver for Selective Service Registrants, and on July 20, 1956, the Adjutant General

endorsed the Moral Waiver for Induction with respect to petitioner, stating "Request for waiver of civil record is approved and induction into the Armed Forces is authorized" (R. 23).

Petitioner, after physical examination, was thereupon classified I-A (R. 23-24). On August 28, 1956, petitioner wrote to the board "in regards to an appeal from the classification of 1-A which I just received from your board and I am dissatisfied with such classification." The letter asserted only a claimed status "as a minister" of Jehovah's Witnesses, and no claim of IV-F status was alleged or suggested. (F. 169).[1] In a letter of the same date, petitioner requested a personal appearance before the board (F. 170). The record of this personal appearance, on September 11, 1956, discloses only a claim by petitioner for a ministry classification (R. 25-26; F. 193). Status as a minister was also asserted in a questionnaire and in numerous letters petitioner filed with the board. Petitioner's personal appearance disclosed work as a shipping clerk for 40 hours per week as against 20 to 30 hours devoted to his ministry (R. 25, F. 193).

On September 11, 1956, petitioner was reclassified I-O, as a conscientious objector (R. 26). On September 19, 1956, petitioner wrote letters concerning an appeal, referring only to his ministry claim and making no claim to IV-F classification (F. 198-200). Upon appeal, the showing of substantial employment

[1] The designation "F." refers to the Selective Service file, Plaintiff's Exhibit No. 1. The number refers to the number appearing at the bottom of each page of the file.

other than that of minister was verified and the appeal board classified petitioner I-O (R. 26-28).

Efforts, made in accordance with the selective service procedure, to obtain petitioner's designation of one of several types of civilian work which he would accept were unavailing (R. 28-31). On October 9, 1957, the local board sent a copy of Selective Service Form No. 153 to petitioner, notifying him that he had been assigned to institutional work at the Los Angeles County Department of Charities, and stating further (F. 243):

> You are ordered to report to the local board named above [at Richmond, California] at 8:30 a.m. on the 21st day of October, 1957, where you will be given instructions to proceed to the place of employment.
>
> You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.
>
> You will be instructed as to your duties at the place of employment.
>
> Failure to report at the hour and on the day named in this order; or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

In the instructions with respect to the use of this form, it was specified that a further letter should be prepared for delivery to the registrant upon his appearance at the board, this letter to state the required

time and place for reporting at the place of civilian work. Four copies of the letter were to be sent to the prospective place of work four days in advance (F. 235), but copies of the Form No. 153 were not to be sent to the place of work until the registrant left the local board for the place of employment (F. 244). Petitioner failed to comply with the order to report to the board (R. 18). Accordingly, the two further steps in the administrative procedure, *i.e.*, the delivery of instructions to petitioner, and the mailing of Form No. 153 by the board to the place of work, never took place.

ARGUMENT

Petitioner's basic contention, as he recognizes (Pet. 13), is the same as that recently rejected in *Korte* v. *United States*, 260 F. 2d 633 (C.A. 9), certiorari denied, 358 U.S. 928. He argues that the possible moral unfitness to be deduced from his prior conviction and imprisonment resulted in permanent exemption, whereas the *Korte* case held that such a history merely affords a basis upon which the authorities could find him undesirable. We submit that the *Korte* decision is sound, since the statutory language relating to the exclusion of those formerly convicted of a felony is patently permissive and not mandatory; it is for the benefit of the armed services and civilian work agencies, not a grant of immunity to the registrant (see Sec. 6(m) *infra*, p. 9).[1a] Petitioner cites no decision in conflict with *Korte* and no

[1a] Over the years, the armed services have waived objections to persons convicted of various crimes in literally thousands of instances.

change of circumstance warranting review by this Court.[2]

Moreover, petitioner's contention is unavailable to him in that he failed to exhaust his administrative remedy by proper presentation of the contention upon appeal when the Selective Service Board took him out of the IV-F classification. If, as petitioner now contends, his former felony could not be waived, the board's reclassification on August 21, 1956, was invalid and petitioner was required to assert his IV-F claim by the available administrative appeal. He did not do so. Instead, he sought classification as a minister (IV-D), a classification which, under the regulations (Sec. 1623.2, *infra*, p. 11), was inconsistent with the claim for IV-F.[3]

There is another respect in which petitioner failed to complete the administrative procedure. Judicial review of a registrant's classification cannot take place before the registrant has "taken all the steps in the selective process" (*Estep* v. *United States*, 327 U.S. 114, 115-116; *Falbo* v. *United States*, 320 U.S. 549, 552-554). The typical manner of exhausting administrative procedure is illustrated by the case of a I-A registrant, who must proceed to the final induction point and there refuse to take the step forward which would mark the final step into service. Only then is there no further possibility of some new

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[2] See the Government's Brief in Opposition in *Korte* v. *United States*, *supra*, 358 U.S. 928, No. 497, O.T. 1958.

[3] The ministry claim, reasserted here but not argued, was clearly invalid in light of petitioner's admitted working hours elsewhere (*supra*, p. 3).

intervening event or personal disqualification or change in the board's orders.

Petitioner, as noted above, had been classified I-O, as a conscientious objector, with a duty to perform work at a civilian agency. He thereupon refused to take what was only a preliminary step—the appearance at the local board. At this appearance he would have received his instructions for proceeding, as a conscientious objector, to the place for civilian work. The preliminary order of October 9, 1957, to report to the board on October 21, was in no sense the end of the process. The date for commencement of the work was not specified in the order. Under the procedures, the copy of the order would not be sent to the work agency until petitioner had actually reported to the board (on October 21) and left the board at Richmond, California, en route to the agency at Los Angeles. The details of the proposed arrangements would be forwarded to the agency four days prior to October 21, but if the agency required a change of the proposed time, or if any other change of circumstances or disqualification intervened, the board, pursuant to the regulations, Sec. 1625.2, *infra*, pp. 11-12, could effect a change or postponement or even a reclassification when petitioner appeared at the board's headquarters.[4]

Petitioner's reliance on *Dodez* v. *United States*, 329 U.S. 338, ignores the fact that the procedure which

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[4] This consideration is the more pertinent here, where petitioner argues that he should have been rejected by the Los Angeles Department of Charities by reason of his unfitness.

prevailed in 1944, was different. As pointed out in *Johnston* v. *United States*, 351 U.S. 215, 222, "at the time of Dodez' breach, the Government delivered the conscientious objector registrants to the place of work. See Order to Report for Work, R. 155, No. 86, 1946 Term." Reporting to the local board could thus be the actual step into service.[5] Certainly, there is no conflict between the decision in *Dodez*, *supra*, and the decisions of this Court in *Falbo* and *Estep*, *supra*, followed by the court below. See *Williams* v. *United States*, 203 F. 2d 85, 88 (C.A. 9), certiorari denied, 345 U.S. 1003; *United States* v. *Sutter*, 127 F. Supp. 109, 117 (S.D. Cal.).

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] See the more extensive discussion of the differences in the earlier procedures involved in *Dodez* set forth in the Government's brief (pp. 23-30, 33, 34 fn. 12) in *Johnston*, *supra*, Nos. 643, 704, O.T. 1955.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, 62 Stat. 604, as amended:

> Sec. 6(h) [50 U.S.C. App. 456(h)]. * * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service * * * of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. * * *
>
> Sec. 6(m) [50 U.S.C. App. 456(m)]. No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.
>
> Sec. 10(b)(3) [50 U.S.C. App. 460(b)(3)]. * * * The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *
>
> * * * * *
>
> (7) [The President is authorized—] to prescribe eligibility, rules, and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title of any person convicted of a violation of any of the provisions of this title;
>
> Sec. 12(a) [50 U.S.C. App. 462(a)]. Any * * * person * * * who otherwise evades or

refuses registration or service in the armed forces or any of the requirements of this title * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulations (32 C.F.R.):

Sec. 1622.44. [E.O. 10659, 21 F.R. 1079] *Class IV-F: Physically, mentally, or morally unfit.* In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces * * *; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.

Sec. 1623.2. [1954 Rev.] *Consideration of classes.* Every registrant shall be placed in Class I-A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class:

I-A-O	IV-A
I-O	IV-B
I-S	IV-C
II-A	IV-D
II-C	IV-F
II-S	V-A
I-D	I-W
III-A	I-C

Sec. 1625.2. [1958 Supp.] *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not

be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Department of the Army Special Regulations, approved 10 April 1953, SR 615-180-1, par. 10d(1):

A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department

* * *

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